

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

JAMES GILLIAM, Individually And On Behalf Of  
All Others Similarly Situated,

Plaintiff,

VS.

Civil Action No. 04cv11600 (NG)

FIDELITY MANAGEMENT AND RESEARCH  
COMPANY, et al.,

Defendants.

BOGATIN FAMILY TRUST, Individually And On  
Behalf Of All Others Similarly Situated,

Plaintiff,

VS.

Civil Action No. 04cv11642 (NG)

FIDELITY MANAGEMENT AND RESEARCH  
COMPANY, et al.,

Defendants.

CYNTHIA A. BENNETT And GUY E. MILLER,

Plaintiffs,

VS.

Civil Action No. 04cv11651 (MLW)

FIDELITY MANAGEMENT AND RESEARCH  
COMPANY, et al.,

Defendants.

GHASSAN J. AWALI, et al., Individually And On  
Behalf Of All Others Similarly Situated,

Plaintiff,

VS.

Civil Action No. 04cv11709 (MLW)

FIDELITY MANAGEMENT AND RESEARCH  
COMPANY, et al.,

Defendants.

*[Caption continues on next page]*

**INDEPENDENT TRUSTEE DEFENDANTS’  
SUBMISSION IN SUPPORT OF FIDELITY DEFENDANTS’  
MOTION FOR CONSOLIDATION AND SEVERANCE OF CLAIMS**

-----  
 WILLIAM S. GROESCHEL, Individually And On  
 Behalf Of All Others Similarly Situated,

Plaintiff,

vs.

FIDELITY MANAGEMENT AND RESEARCH  
 COMPANY, et al.,

Defendants.

)  
)  
)  
)  
) Civil Action No. 04cv11735 (GAO)  
)  
)  
)  
)

-----  
 NANCY HAUGEN, MICHAEL F. MAGNAN,  
 KAREN L. MAGNAN, ROSE M. IANNACCONI,  
 PRESLEY C. PHILLIPS, ANDREA M. PHILLIPS,  
 And CINDY SCHURGIN, For The Use And Benefit Of  
 FIDELITY MAGELLAN AND FIDELITY  
 CONTRAFUND,

Plaintiffs,

vs.

FIDELITY MANAGEMENT AND RESEARCH  
 COMPANY, et al.,

Defendants.

)  
)  
)  
)  
) Civil Action No. 04cv11756 (MLW)  
)  
)  
)  
)

-----  
 DAVID O. FALLERT, Individually And On  
 Behalf Of All Others Similarly Situated,

Plaintiff,

vs.

FIDELITY MANAGEMENT AND RESEARCH  
 COMPANY, et al.,

Defendants.

)  
)  
)  
)  
) Civil Action No. 04cv11812 (MLW)  
)  
)  
)  
)

-----  
**INDEPENDENT TRUSTEE DEFENDANTS’  
 SUBMISSION IN SUPPORT OF FIDELITY DEFENDANTS’  
 MOTION FOR CONSOLIDATION AND SEVERANCE OF CLAIMS**

Defendants J. Michael Cook, Ralph F. Cox, Robert M. Gates, George H. Heilmeier,  
 Donald J. Kirk, Marie L. Knowles, Ned C. Lautenbach, Marvin L. Mann, William O. McCoy,  
 Gerald C. McDonough, and William S. Stavropoulos (collectively, the “Independent Trustee  
 Defendants”) are named defendants in the *Gilliam, Bogatin, Awali, Groeschel* and *Fallert*

actions (the “Revenue Sharing” cases).<sup>1</sup> The Independent Trustee Defendants make this submission in support of the Motion for Consolidation and Severance of Claims filed by the Fidelity Defendants on December 22, 2004 (the “Fidelity Defendants’ Motion”).

As indicated in previous filings,<sup>2</sup> the Independent Trustee Defendants join the Fidelity Defendants in not opposing the consolidation of the Revenue Sharing cases, but opposing the further consolidation of those five actions with the *Bennett* and *Haugen* actions (the “Excessive Management Fee” cases).<sup>3</sup> The Excessive Management Fee complaints assert identical claims for breaches of fiduciary duty in violation of § 36(b) of the Investment Company Act of 1940 on the ground that the *overall management fees* charged to certain Fidelity mutual funds are *excessive* because they are “so disproportionately large that they bear no reasonable relationship to the services rendered,” *Gartenberg v. Merrill Lynch Asset. Mgmt., Inc.*, 694 F.2d 923, 928 (2d Cir. 1982) (“*Gartenberg* claims”). In contrast, the Revenue Sharing complaints assert identical claims for violations of numerous statutory provisions and alleged common law duties with respect to *specific distribution fees* as the result of *particular brokerage practices*.

The Revenue Sharing complaints plainly do not assert any *Gartenberg* claims. The contentions to the contrary in the Revenue Sharing plaintiffs’ December 2, 2004 Memorandum in Further Support of Consolidation (*Gilliam* Docket No. 66) is incorrect. Moreover, even if the Revenue Sharing complaints were amended to include *Gartenberg* claims, the Independent

---

<sup>1</sup> The Revenue Sharing plaintiffs have indicated that their proposed amended complaints will not include currently named defendant Thomas R. Williams, a former Independent Trustee who was not served and is deceased.

<sup>2</sup> See Memorandum of Independent Trustee Defendants in Opposition to Motion for Consolidation, Oct. 7, 2004, *Gilliam* Docket No. 11; Independent Trustee Defendants’ Response to Notice of Pending Motions in Related Cases, Nov. 30, 2004, *Gilliam* Docket No. 64.

<sup>3</sup> The Revenue Sharing cases were reassigned following recusal by Judge Stearns. (*Gilliam* and *Bogatin* are pending before Judge Gertner; *Groeschel* is pending before Judge O’Toole; and *Awali* and *Fallert* are pending before Judge Wolf.) The Excessive Management Fee cases are pending before Judge Wolf, and those plaintiffs also oppose consolidation with the Revenue Sharing cases.

Trustee Defendants submit that, for the reasons set forth in the Fidelity Defendants' Motion, such amendment should not lead to consolidation of these still radically different groups of actions.

Rather, any *Gartenberg* claims properly pleaded in the Revenue Sharing cases should be severed and transferred to Judge Wolf for consolidation with the Excessive Management Fee cases.

Dated: December 30, 2004

Respectfully submitted,

/s/ Sandra Sue McQuay

Of Counsel:

John S. Kiernan  
Suzanne M. Grosso  
DEBEVOISE & PLIMPTON LLP  
919 Third Avenue  
New York,, New York 10022  
Telephone (212) 909-6755

---

Sandra Sue McQuay (BBO No. 340120)  
SULLIVAN, WEINSTEIN & MCQUAY  
2 Park Plaza  
Boston, Massachusetts 02116  
Telephone (617) 348-4300  
Email: smcquay@swmlawyers.com

*Attorneys for Independent Trustee Defendants*